IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPEAL NO.198 OF 2006

Santosh Mohan Paithankar
H.No.114, 'E' Ward, Sadar
Bazar, District: Kolhapur ...Applicant.
V/s.
The State of Maharashtra ...Respondent.

Mr.Agandsurve, adv. for the Applicant.
Shri Adsule, APP for the Respondent/State.

CORAM: J.H.BHATIA, J.
DATE : 28th February, 2007.

ORAL JUDGMENT:

1. The appellant, who was the accused in Sessions Case No.12 of 2005, was convicted for the offence punishable under Sections 363, 366 and 376 of the I.P.C. and was sentenced to undergo R.I. for 7 years and to pay a fine of Rs.500/-, R.I. for one year with fine of Rs.300/- and R.I. for one year with fine of Rs.300/- respectively by the impugned judgment and order dated 12th January, 2006 passed by the IInd Additional Sessions Judge, Kolhapur. The appellant by this appeal has challenged the conviction and sentence.

2. Prosecution case in brief, is that the prosecutrix, a girl aged about 15 years was forcibly kidnapped by the appellant on 12-10-2004 at about 10 p.m. from the lane in front of her house. The accused

is a rickshaw driver and used to ply rickshaw of one Lata Patil, who is neighbour of the prosecutrix. About 8 days prior to the incident, the accused had asked the prosecutrix whether she was ready to come alongwith him but she had refused. On 12-10-2004 at about 10.00 p.m. she was proceeding towards a grocery shop to purchase cotton. At that time, the accused came by auto rickshaw bearing no.MH-09 S 4919, which he used to drive. He stopped the rickshaw by the side of the prosecutrix, obstructed her and made her sit in the rickshaw by giving threats to kill her as well as her father if she would not accompany him. Under the fear, she sat in the auto rickshaw and thereafter the accused took her to the barren land at Sambhaji Nagar. He parked the rickshaw near a tree and committed rape on her on the back seat of the rickshaw itself. During that night, they stayed in the rickshaw itself. Next day morning accused took the prosecutrix to different parts of the city by his rickshaw and in the evening again he took her back to Sambhaji Nagar, where again he had sexual intercourse with her. That night also they stayed there. Again on third day, i.e., on 14-12-2004 for the whole day they moved around the city of Kolhapur by the rickshaw and at about 7.00 p.m. she was left in front of one Rajesh Motors near Kawla Naka, where from she was taken to her house by one person commonly known as 'Driver Baba'.

After that her father called her uncle and then she went to her uncle's house. Next day also she was at her uncle's house. She narrated the whole incident to her mother, father and uncle. On 16-10-2004 at about 10.30 a.m. she went to Shahupuri police station, where she lodged the report. On her report, crime no.225 of 2004 came to be registered. She was referred for medical examination. Her clothes were seized and the accused was also arrested on the same day. He was also subjected to medical examination and his clothes were also seized. The rickshaw, which was allegedly used for the commission of this crime was also taken in custody. Statements of other witnesses were recorded and after investigation, the charge-sheet was filed and the case was committed to the Court of Sessions.

3. The charges were framed against the accused. He pleaded not guilty. According to him, he was falsely implicated because there were disputes between the mother of the prosecutrix and Latabai. The prosecutrix had illicit relations with two boys namely, Ravi and Ajay and earlier also on certain occasions, she had lived away from her house with those boys and she was involved in sexual intercourse with them. According to the accused on 12th October, 2004 he had left the rickshaw at 6.00 p.m. at the house of Latabai. On 13th

October, 2004, there was election and on that day he had voted and was not driving the rickshaw. On 14th October also he had left the rickshaw at about 6.00 p.m. and was busy in a religious procession.

4. On behalf of the prosecution, in all 7 witnesses were examined. On behalf of the defence also 5 witnesses were examined. The learned Trial Court rejected the defence story and relying upon the testimony of the prosecutrix, convicted the accused and sentenced him as stated above.

5. Heard Mr.Agandsurve, the learned counsel for the appellant and Mr.Adsule, the learned APP for the State. Perused the record and proceeding. Mr.Agandsurve vehemently contended that the prosecutrix does not appear to be a reliable witness because of her character and her previous sexual experience and she is not corroborated by any evidence including the medical evidence and the reports of the C.A. According to him, there were number of shops within the distance of 100 meters from the house of the prosecutrix and there used to be continuous traffic on the road but nobody noticed the prosecutrix being taken away by the accused. The incident occurred in Kolhapur city itself and she was allegedly taken in another part of the Kolhapur city.

For complete two days, she was moving around the city in the rickshaw alongwith the accused but she did not make any complaint nor she shouted or cried to take help of the police or people. On 13th October, 2004 because of the election all over the city, there was police bandobast and everywhere police was available. If she desired, she could have made a complaint. It is contended that even after she came back to her house in the evening of 14th October, there was delay of two days in lodging the report and therefore, it will not be safe to place implicit reliance on her testimony. On the other hand, Mr.Adsule, the learned APP vehemently contended that no respectable woman will make false charge of rape on herself and she, being a girl aged about 14 or 15 years, was unable to resist. According to him, there is no reason to disbelieve her version. He supported the impugned order of conviction.

6. The prosecutrix was examined as P.W.1 and she had narrated the whole prosecution story in her deposition . P.W.2 Shalanbai is her mother and P.W.6 Bharat is the panch witness while P.W.7 Police Inspector Nirmala Lokare was the Investigating Officer. Admitted fact is that the prosecutrix, her mother and father used to reside in Sadar Bazar locality of Kolhapur and D.W.1-Latabai Patil is their neighbour. Admittedly, the

accused is also a distant relative of the said Latabai and he used to ply rickshaw of Latabai Patil therefore, he used to come to that locality. According to the prosecutrix about 8 days prior to this incident, accused had asked her whether she would be ready to come alongwith him but she had refused. On 12-10-2004 at about 10.00 p.m. she was asked by her mother to bring some cotton from nearby grocery shop and therefore, she left the house to go to the grocery shop. However, at a short distance from her house, accused obstructed her and by giving threats to the life of herself and her father, he made her sit in his rickshaw. Thereafter, he took her to Sambhaji Nagar, which is another locality of Kolhapur city. There he parked rickshaw in some deserted area and made her lie on the backseat of the rickshaw. After removing clothes of himself and the nicker of the prosecutrix, he committed rape on her. After that both of them remained in the rickshaw itself for the whole night. On the next day, the accused took her around the city in rickshaw and in the evening took her back to same place at Sambhaji nagar. Again he had sexual intercourse with her in the rickshaw. During the following night also they stayed in the rickshaw itself. Next day again he took her around the city and thus, they were moving around the city for the whole day. In the evening at about 7.00 p.m., the accused left her

near Rajesh Motors. According to her, from there her neighbour known as 'Driver Baba' took her to her uncle's house. After sometime her mother came there but she stayed at her uncle's house during the following night and on the next day also. On 16-10-2004 she lodged the report of this incident.

7. Her mother P.W.2 Shalanbai deposed that the prosecutrix had left the house at about 10.00 p.m. to go to the grocery shop but she did not come back. She came back after 3 days and narrated the whole incident. She also told them that the accused had sexual intercourse with her in his autorickshaw. According to her at the house of her uncle, she had taken bath and also changed her clothes. On the next day due to some abdominal pain, she was taking rest and the next day thereafter i.e., on Saturday she was taken to Shahupuri Police Station, where she lodged the F.I.R. Exhibit 22.

8. Admittedly almost immediately after recording of her F.I.R., she was referred to C.P.R.Hospital for medical examination. P.W.3 Dr.Uttam Sardesai examined her. The prosecutrix told him that from 13th October to 15th October, she was in her menses. On examination, she was found well oriented. There was no injury on her private part. Labia majora was normal. Vaginal mucous

was normal. Hymen was torn and as per the medical officer, the prosecutrix was habitual for sexual intercourse. She alleged that on 12 and 13th October, 2004, she was raped twice. She also gave history of intercourse with the same boy a week before.

9. It is not the prosecution case that prior to 12th October, she had sexual intercourse with the accused. From her oral evidence, it appears that date of her birth is 27th June, 1990 and this is supported by the evidence of P.W.4 Ashok Pandharbale, the Head Master of Prakash Vidya Mandir, Sadar Bazar, Kolhapur, where she was a student. If this date was taken to be correct, she was hardly 14 years 4 months old at the time of incident. As per the medical examination, she was aged more than 15 years but less than 17 years. The accused does not claim that he had sexual intercourse with her consent; therefore, her age is not material. If she was kidnapped and there was forcible sexual intercourse with her, the offence of kidnapping and rape was completed irrespective of her age. In the cross-examination of the prosecutrix, it was put to her that she was in habit of sexual intercourse and had sexual relations with 2 boys, namely Ravi and Ajay, which she denied. In spite of this during the medical examination, it was found that she was habitual to

sexual intercourse. Possibly in view of this, the medical officer must have asked the prosecutrix about her previous sexual intercourse and she explained that she had sexual intercourse with the same boy a week ago while infact, she did not have sexual intercourse with the accused according to her own story prior to 12th October, 2004. From this inference can be drawn that she was in habit of sexual intercourse with some other person but she was not willing to disclose name of that person and she alleged that one week prior to this incident also she had intercourse with the same boy, meaning thereby that she had sexual intercourse with the accused and this is not the fact, even according to her. It shows that the witness is not truthful.

10. It is also material to note that as per her admission in her evidence, on both the occasions i.e., on 12th and 13th October, semen of the accused had fallen on her clothes as well as on the clothes of the accused. As per the history given by her to the medical officer, she was in her menses from 13th October, 2004. It means when on 13th October, 2004, the accused had sexual intercourse with her, she was in menses therefore, possibility could not be ruled out that the clothes of the accused might have been stained with her blood. Though in her deposition before the Court, she

did not depose that she had taken bath, it appears that in her F.I.R., she had stated that at the house of her uncle she had taken a bath. Her mother also deposed that she had taken bath at the uncle's house and had changed the clothes. Clothes of the prosecutrix as well as the accused were seized. As per the C.A.Reports, no blood or semen stains were found on the clothes of the accused. No semen stains were found on the clothes of the prosecutrix though on her petticoat and underwear blood stains were found. The said blood stains were of 'B'group, which was her own blood group. Presence of the blood stains on her underwear and petticoat does not help the prosecution, particularly when she was in her menses during the relevant period. On pubic hairs of the accused, no semen or vaginal fluid was detected. On the pubic hair and vaginal swab or nail clippings of the prosecutrix, no semen was detected. Thus, neither the medical evidence nor the report of the forensic laboratory provide any corroboration to the testimony of the prosecutrix. If she is to be believed, on the clothes of herself and those of the accused semen stains must have been found. It is not her case that her clothes were washed before the seizure. Therefore, even though she had taken bath, the semen stains could be found on her clothes.

11. The evidence of her mother P.W.2 Shalanbai and P.W.7 Nirmala Lokare I.O. revealed that there were number of grocery shops within the distance of 100 meters from the house of the prosecutrix. Just near her house, there is a main road on which there is a heavy traffic round the clock. Her house is situated almost in the centre of the cluster of the houses and at a short distance from her house, she was made to sit in the rickshaw by the accused. If she was threatened or forced to sit in the rickshaw, she could have certainly shouted for her help and many people from the locality could come out. But it appears that she did not raise any alarm to invite attention of the people in the area. Not only this for the next two days, according to her own evidence, she was moving around the Kolhapur city alongwith the accused in his rickshaw. On the next day after moving around the city, she was taken back to Sambhaji Nagar and again on 14th October she moved around the city. The evidence of I.O. and other witnesses clearly shows that because of the election on 13th October, 2004 in every part of the city, there was police bandobast from 5.00 a.m. till late night. In such circumstances, she could find police in any part of the city and if she desired, she could shout and call attention of police and take their help but she kept quiet. This conduct of the prosecutrix agitates against

the story that she was forcibly taken away by the accused and she was raped.

12. If we look to defence witnesses , it would appear from evidence of D.W.1 Latabai that the accused used to take the rickshaw at 9.00 a.m. and used to return at 6.00 p.m. everyday. On 12th October, 2004, he had taken rickshaw at 9.00 a.m. and as usual returned rickshaw at 6.00 p.m. According to her on 13th October, 2004 because of the election, the accused had not plied the rickshaw. On 14th October, 2004 again as usual he had taken rickshaw at 9.00 a.m. and returned the same at 6.00 p.m. If this evidence is to be believed, the accused could not have taken away the prosecutrix in his rickshaw on 12-10-2004 at about 10.00 p.m. nor he could live alongwith the prosecutrix in the rickshaw for two days and two nights continuously. Evidence of D.W.4 Suryakant Chougale reveals that accused himself is a social worker and both had worked together during the assembly election. According to him the accused was sitting with him on table near Korgaonkar High School polling centre from 9.30 a.m. till 3.30 p.m. and according to him, the accused left at 3.30 p.m. to cast his vote. Thus, as per this evidence , the accused was not with the prosecutrix on 13-10-2004. D.W.5 Sanjay Sonkamble deposed that on that

day there was assembly election and he himself was acting as a polling agent at Sant Gadge Maharaj Vidya Mandir. The polling centre was in the compound of Korgaonkar High School. According to him, the accused exercised his right of vote at about 3.30 p.m. or 4.00 p.m. Thus, D.W.5 Sanjay also provides corroboration to D.W.4 Suryakant that the accused had left at about 3.30 p.m. to cast his vote. Evidence of P.W.3 Meghraj Redekar shows that he is running a banjo band party. That appears to be his hereditary occupation. According to him for the procession of Durga Mata, the accused had engaged him for playing music. According to him, he returned at about 10 or 11 p.m. after that procession. He also deposed that the accused was with him on that day. Admittedly, the said festival was on 14th October, 2004. It means on 14-10-2004 the accused was with Meghraj and was busy in the procession.

13. If defence evidence pointed out above is believed, the accused was busy either in election or in the religious procession on 13th and 14th October, 2004. In the evening of 12th October, 2004 at 6.00 p.m. he had left the rickshaw. This defence evidence agitates against the evidence of the prosecutrix. The learned Trial Court rejected the defence evidence mainly on the ground that the D.W.1 Latabai appears to be relative of

the accused and D.W.3 Meghraj, D.W.4 Suryakant and D.W.5 Sanjay could not produce any documents to support their evidence. The learned Trial Court observed that there was no reason for the prosecutrix to falsely implicate the accused in this case and that no respectable woman is likely to falsely make such charge involving her own respect and honour.

14. It is well settled legal position that while the prosecution has to prove the offence and bring home the guilt of the accused beyond any reasonable doubt, standard of proof required from the defence is not that stringent. If the accused by the defence evidence can only establish that his defence is probable that itself is sufficient to discharge the burden. The learned Trial Court appears to have lost sight of this legal position. In the present case, the accused examined number of witnesses to show that during the relevant 3 days and particularly on 13th and 14th October, he could not be with the prosecutrix and he could not have committed the offence of rape. The conduct of the prosecutrix in not raising any shouts, cries or not taking any help of the police or other people when she was being kidnapped or when she was taken around the city for two days, shows that she may not be speaking the truth. If she was really kidnapped and that too

against her desire, certainly she could raise shouts and invite attention of the people of the locality. On the next two days because of the election and religious procession, police bandobast was available in every corner of the city. She could certainly take help of the police by raising alarm but she kept quiet. This could not be the normal conduct of the girl, who is kidnapped and raped. Besides this, the medical evidence and C.A.Reports do not corroborate her version. In such circumstances, prosecution is left with the sole testimony of the prosecutrix without any corroboration and her own conduct agitates against her own testimony. In such circumstances, the defence evidence can not be simply thrown away. Atleast it creates a doubt about truthfulness of the evidence of the prosecutrix.

15. It is now well settled that in the case of rape, the conviction can be based on the sole testimony of the prosecutrix if her testimony is found trustworthy and reliable and there are no circumstances which would cast doubt on her veracity. In **Sudhansu Sekhar Sahoo v. The State of Orissa 2003 Supreme Court Cases (Cri) 1484,** the Supreme Court observed as follows in paragraph 11 and 18:

"It is true that the sole testimony of the

> victim of a sexual offence can be a basis for conviction provided it is safe, reliable and worthy of acceptance. This Court had occasion, in many cases, to consider the nature of evidence required when the conviction was mainly based on the testimony of the victim of a sexual offence.
>
> It is well settled that in rape cases the conviction can be solely based on the evidence of the victim, provided such evidence inspires confidence in the mind of the court. The victim is not treated as an accomplice, but could only be characterised as injured witness. It is also reasonable to assume that no woman would falsely implicate a person in a sexual offence as the honour and prestige of that woman also would be at stake. However, the evidence of the prosecution shall be cogent and convincing and if they is any supporting material likely to be available, then the rule of prudence requires that evidence of the victim may be supported by such corroborative material."

In **Vimal Suresh Kamble v. Chaluverapinake Apal S.P. and another 2003 Criminal Law Journal 910,** the Supreme Court observed as follows in paragraph 21:

> "On an overall appreciation of the evidence of the prosecutrix and her conduct we have come to the conclusion that P.W.1 is not a reliable witness. We, therefore, concur with the view of the High Court that a conviction cannot be safely based upon the evidence of the prosecutrix alone. It is no doubt true that in law the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. The evidence of the prosecutrix in this case is not of such quality, and there is no other evidence on record which may even lend some assurance, short of corroboration that she is making a

truthful statement...."

In **Ramdas & Ors. v. State of Maharashtra AIR 2007 Supreme Court 155,** the Supreme Court observed as follows in paragraph 22:

> "It is no doubt true that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such quality that may be sufficient to sustain an order of conviction solely on the basis of her testimony. In the instant case we do not find her evidence to be of such quality.

16. In view of the legal position settled in a large number of cases, it is now well settled that conviction in the case of rape can be based solely on the testimony of the prosecutrix, provided the Court is convinced about the truthfulness of the prosecutrix and there are no circumstances to doubt or suspect her own conduct and veracity. If her evidence is truthful and of such quality, then only conviction can be based on her testimony alone. In the present case as pointed out above, evidence of the prosecutrix is not of such a quality which will inspire confidence nor there is any other evidence which would lead some assurance that her evidence is truthful.

17. Taking into consideration the legal position and the evidence in its totality, I find that the prosecution has failed to prove beyond a reasonable doubt that the accused had kidnapped and committed rape on the prosecutrix. Therefore, benefit of doubt may be given to him. In the result, the impugned judgment and order of conviction and sentence are liable to be set aside.

18. For the aforesaid reasons, appeal is allowed. The impugned order of conviction and sentence is hereby set aside. Accused is hereby acquitted. He be released forthwith if not required in any other case.

(J.H.Bhatia,J.)